



This document is scheduled to be published in the Federal Register on 08/18/2016 and available online at <http://federalregister.gov/a/2016-19452>, and on FDsys.gov

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 301, and 602

[TD 9782]

RIN 1545-BK06

Tax on Certain Foreign Procurement

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 5000C of the Internal Revenue Code relating to the 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. The regulations affect U.S. government acquiring agencies and foreign persons providing certain goods or services to the U.S. government pursuant to a contract. This document also contains final regulations under section 6114, with respect to foreign persons claiming an exemption from the 2 percent tax under an income tax treaty.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §1.5000C-7 and § 301.6114-1(e)(2).

FOR FURTHER INFORMATION CONTACT: Kate Hwa at (202) 317-6934, and for questions related to tax treaties and the regulations under section 6114, Rosy Lor at

(202) 317-6933, (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On January 2, 2011, section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111-347 (the Act), 124 Stat. 3623, added section 5000C to the Internal Revenue Code (Code). Section 5000C(a) imposes on any foreign person that receives a specified Federal procurement payment a tax equal to 2 percent of the amount such payment. Section 5000C(b) defines the term specified Federal procurement payment as any payment made pursuant to a contract with the Government of the United States (U.S. government) for goods or services if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement agreement with the United States. Section 301(a)(3) of the Act provides that section 5000C applies to payments received pursuant to contracts entered into on and after January 2, 2011. Additionally, section 301(b)(1)(c) of the Act states that this section must be applied in a manner consistent with U.S. obligations under international agreements. Section 5000C(d)(1) provides that the amount deducted and withheld under chapter 3 shall be increased by the amount of tax imposed under section 5000C.

On April 22, 2015, the Department of Treasury (Treasury Department) and the Internal Revenue Service (IRS) published in the Federal Register (80 FR 22449) a notice of proposed rulemaking (REG-103281-11) (NPRM) under sections 5000C and

6114 (the proposed regulations). The regulations set forth a number of exemptions from the tax and provided procedures for collecting the tax. Notice 2015-35, 2015-18 I.R.B. 943, issued contemporaneously with the proposed regulations, provided a list of income tax treaties in effect that prevented the imposition of the tax. No public hearing was requested or held. Written comments on the proposed regulations were received and are available at www.regulations.gov or upon request. After consideration of the comments, the proposed regulations are adopted as amended by this Treasury decision. The revisions are discussed below.

Explanation and Summary of Comments

1. Payments by Contracting Parties to Subcontractors

A commenter asked for clarification that the proposed regulations apply only to payments made by the U.S. government to direct (prime) contractors with the U.S. government, and not to payments made by prime contractors pursuant to subcontracts. Consistent with the proposed regulations, the final regulations provide section 5000C imposes the tax on any foreign contracting party, which means a foreign person that is a party to a contract with the U.S. government that was entered into on or after January 2, 2011. Therefore, the final regulations do not generally impose the tax on a subcontractor that is not party to a contract with the U.S. government. For example, if an acquiring agency contracts with a domestic corporation (prime contractor) for goods or services, and the prime contractor separately contracts with a foreign subcontractor for goods and services to be provided under the contract, section 5000C will not

ordinarily apply to payments by the prime contractor to its foreign subcontractor that relate to those goods or services.

However, the activities of a subcontractor are taken into account when determining the country in which goods are manufactured or produced or in which services are provided under §1.5000C-1(e). Furthermore, the final regulations retain the rules in the proposed regulations that payments received by a nominee or agent on behalf of a contracting party are considered to be received by that contracting party. For the definition of a contracting party, see §1.5000C-1(c)(4). The final regulations also retain the anti-abuse rule in §1.5000C-5 that in certain circumstances may treat a subcontractor that is a foreign person as being liable for tax under section 5000C.

2. Exemption for Certain Foreign Humanitarian Assistance Contracts

The United States Agency for International Development (USAID) regularly enters into contracts with foreign persons for goods and services for purposes of implementing USAID's development projects and programs in a host country. The proposed regulations do not provide relief from the tax under section 5000C for payments made pursuant to some of these contracts. The Treasury Department and the IRS have concluded that it is appropriate to exempt from the tax payments made to foreign contracting parties that USAID engages to execute its development projects and programs in a host country. In this context, the U.S. government is not procuring goods and services for its own benefit, but rather to provide humanitarian assistance for the benefit of the host countries. As a result, the final regulations add an exemption under

which section 5000C does not apply to a contract for the purpose of obtaining goods or services described in or authorized under certain specified statutes that are for the purpose of providing foreign humanitarian assistance when the acquiring agency determines that the payment is for the purpose of providing foreign humanitarian assistance. This exemption generally applies to a contract entered into by an acquiring agency with a foreign contracting party to obtain goods or services for purposes of implementing an agreement between the United States and a foreign country or a group of countries to provide foreign humanitarian assistance as authorized under the Food for Peace Act (7 U.S.C. 1691, et seq.) and the Foreign Assistance Act of 1961 (22 U.S.C. 2151, et seq.).

Similarly, this exemption also generally applies to contracts providing foreign humanitarian assistance under the Migration and Refugee Assistance Act of 1962 (22 U.S.C. 2601 et seq.), the Freedom Support Act of 1992 (22 U.S.C. 5801 et seq.), and the SEED Act of 1989 (22 U.S.C. 5401 et seq.), and to transportation of humanitarian relief supplies to foreign countries described in 10 U.S.C. 402, foreign disaster assistance described in 10 U.S.C. 404, humanitarian demining assistance described in 10 U.S.C. 407, excess non-lethal supplies for humanitarian relief purposes described in 10 U.S.C. 2557, and transportation of humanitarian relief and for other humanitarian purposes described in 10 U.S.C. 2561. See §1.5000C-1(d)(4). A corresponding change is made to the withholding rules to take into account this exemption. See §1.5000C-2(b)(6).

3. Procurement Not Pursuant to the Federal Acquisition Regulations

A commenter noted that it was unclear whether payments by acquiring agencies under contracts that are not entered into pursuant to the Federal Acquisition Regulations (FAR) are subject to tax under section 5000C. The FAR is the body of rules that generally governs acquisitions and contracting procedures for federal agencies. See 48 CFR Chapter 1. Although the final regulations utilize certain concepts and definitions contained in the FAR, neither the Act nor the final regulations are limited to contracts executed pursuant to the FAR. Thus, while the term “contract” in the proposed and final regulations uses the FAR definition of the term “contract”, it can nevertheless include a contract that is not executed under the FAR. A sentence was added to the definition of contract in the final regulations to clarify this point.

4. Definition of International Procurement Agreement and Least Developed Countries

The General Explanation of Tax Legislation prepared by the Staff of the Joint Committee on Taxation accompanying section 5000C explains that parties engaged in cross-border transactions are required to comply with relevant trade agreements of the jurisdictions in which they operate. See Staff of the Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress (JCS-2-11), at 694, March 16, 2011 (Joint Committee Explanation). In describing these obligations, the Joint Committee Explanation listed the Government Procurement Agreement (GPA) that is an annex to the World Trade Organization agreement, as well as the government procurement obligations of U.S. free trade agreements. Id. Accordingly, the proposed

regulations defined the term international procurement agreement as the World Trade Organization GPA (WTO GPA) within the meaning of 48 CFR 25.400(a)(1) and any free trade agreement to which the United States is a party that includes government procurement obligations that provide appropriate competitive government procurement opportunities to U.S. goods, services, and suppliers.

One commenter noted that the FAR provides that eligible products from WTO GPA and free trade agreement countries are entitled to certain nondiscriminatory treatment, and that 48 CFR 25.404 expands this nondiscriminatory treatment to include least developed countries described in 48 CFR 25.400(a)(3). The commenter requested that the final regulations also expand the definition of international procurement agreement to include goods manufactured or produced or services provided in a least developed country.

The final regulations do not adopt this comment for two reasons. First, the proposed regulations referred to 48 CFR 25.400(a)(1) in order to utilize a term that was widely understood in the context of government procurement but was not intended to incorporate any related provisions of the FAR. Second, the Joint Committee Explanation indicates that Congress intended the exemption under section 5000C(b) related to international procurement agreements to be limited to signatories of free trade agreements with government procurement obligations or procurement agreements.

5. Definition of International Agreements

Section 301(c) of the Act requires that section 5000C be applied in a manner

consistent with the United States' obligations under international agreements. A commenter indicated that the proposed regulations limit international agreements that may affect the application of section 5000C to income tax treaties and requested that final regulations include other international agreements that may impact taxation. In particular, the commenter indicated that the Vienna Convention on Consular Relations and bilateral framework agreements negotiated and administered by USAID contain tax provisions.

The final regulations do not adopt this request. The specific international agreements to which the commenter referred prohibit host country taxation of expenditures of a U.S. consulate or amounts provided through USAID programs but do not limit the United States' taxing rights. Consequently, these international agreements do not provide relief from the tax imposed under section 5000C. Furthermore, in identifying the income tax treaties that provide relief from the tax under section 5000C, the regulations do not preclude a foreign contracting party from claiming relief from the tax under any other applicable international agreement.

6. Simplified Acquisition Threshold

The proposed regulations provide that the tax imposed under section 5000C will not apply to payments for purchases under the simplified acquisition procedures described in the FAR that do not exceed the simplified acquisition threshold in 48 CFR 2.101. One commenter recommended that the determination of the \$150,000 simplified acquisition threshold should be computed on an annual basis rather than on a contract-

by-contract basis. The final regulations do not adopt this suggestion because the Treasury Department and the IRS have determined that it is generally more administrable to make a determination of the threshold amount when entering into a particular contract. However, as described in 7. Personal Service Contracts of this preamble, this suggestion has been adopted in the limited context of personal service contracts.

7. Personal Service Contracts

A commenter requested a new exemption from the tax for service contracts entered into with individuals (personal service contracts). The commenter further stated that some acquiring agencies do not use the FAR to procure personal services from individuals. As such, the commenter stated that these personal service contracts do not fall within the simplified acquisition procedures of the FAR but typically are for an amount less than \$150,000 per contract. The commenter also suggested that the threshold amount of personal service contracts with individuals would be more appropriately determined on an annual (rather than a per contract) basis.

Section 5000C applies to contracts for the provision of services, so the final regulations do not provide an exemption for all personal service contracts. However, the Treasury Department and the IRS have decided that it is appropriate to extend the simplified acquisition exemption to personal service contracts, whether or not they are not executed pursuant to the FAR. Further, the Treasury Department and the IRS agree with the comment that when applying this exemption, the amount paid for

personal services under the contracts should be determined on an annual basis.

Accordingly, the final regulations provide an exemption in §1.5000C-1(d)(3) for payments for services provided by, and under contracts with, a single individual in which the payments do not exceed on an annual basis the simplified acquisition threshold as described in 48 CFR 2.101 for all years of the contract. A corresponding change is made to the withholding rules to take into account this exemption. See §1.5000C-2(b)(5).

8. Definition of Emergency Acquisition

Proposed §1.5000C-1(d)(2) exempts payments pursuant to contracts awarded for certain emergency acquisitions. One commenter suggested that this exemption be broadened to include contracts that involve other agency acquisitions of importance to the government, such as contracts for acquisitions determined to be in the national interest by the acquiring agency. The final regulations do not adopt this comment for two reasons. First, the Treasury Department and the IRS have concluded that the more limited exemption in the proposed regulations appropriately balances compliance with section 5000C with the government's need to procure goods and services in certain emergency situations. Second, the commenter's suggestion would introduce a subjective, potentially overbroad exemption from the tax imposed by section 5000C.

9. Credit Card Payments

One commenter requested a new exemption from the section 5000C tax for payments made with a credit card. The commenter indicated that applying the section

5000C tax to payments made with a credit card would be difficult to administer because of the volume of these transactions.

The final regulations do not adopt this suggestion for several reasons. First, in most cases, payments made with a credit card will be in an amount that will fall within the exemption for payments for simplified acquisitions, which applies to purchases under the simplified acquisition procedures described in the FAR that do not exceed the simplified acquisition threshold as described in 48 CFR 2.101. See §1.5000C-1(d)(1). Second, in cases in which payments made with a credit card do not meet the exemption for simplified acquisitions, adopting this comment would allow foreign contracting parties to avoid the tax by receiving payment with a credit card for large amounts that should be subject to the tax.

10. Payments Only in Part for Goods or Services

A commenter indicated that, in some circumstances, a contract may be for goods or services but also include payments that are not for goods or services, giving as an example payments to reimburse taxes incurred by the contracting party. In response to the comment, the withholding steps in the final regulations clarify that acquiring agencies should not withhold to the extent that a payment is for something other than goods or services. See §1.5000C-2(b)(1). However, this clarification should not be read to mean that payments to reimburse taxes incurred by the contracting party in providing goods or services are anything other than payments for those goods or services

11. Form W-14, “Certificate of Foreign Contracting Party Receiving Federal Procurement Payments”

The proposed regulations provided that a foreign contracting party must submit a “Section 5000C Certificate” that provides all of the information required by the proposed regulations to claim an exemption from section 5000C. The proposed regulations also contained a model Section 5000C Certificate. Simultaneous with the publication of the final regulations, the IRS is publishing Form W-14, “Certificate of Foreign Contracting Party Receiving Federal Procurement Payments,” which may be used as the Section 5000C Certificate. Accordingly, the final regulations do not contain a model Section 5000C Certificate but rather provide that a foreign person may use Form W-14 as its Section 5000C Certificate provided that it includes all the necessary information. See §§1.5000C-1(c)(14) and 1.5000C-2(d)(7).

Notice 2015-35 listed the countries that had entered into qualified income tax treaties with the United States as of the date of its publication. The instructions to Form W-14, issued contemporaneously with the publication of these final regulations, identify income tax treaties in force, as of the date of the issuance of the form, that are qualified income tax treaties. When new income tax treaties come into force, foreign persons and acquiring agencies should review IRS Forms, Instructions, Publications or other media (including www.irs.gov) for an updated list of qualified income tax treaties, rather than Notice 2015-35.

12. Change in Circumstances

Section 1.5000C-2(d)(6) provides that a foreign contracting party must submit a revised Section 5000C Certificate within 30 days of a change in circumstances that causes the information in a Section 5000C Certificate held by the acquiring agency to be incorrect with respect to the acquiring agency's determination of whether to withhold or the amount of withholding under Section 5000C. One commenter suggested that an example would be helpful to illustrate this rule. In response to this comment, an example was added to illustrate the withholding obligation of an acquiring agency when it receives a revised Section 5000C Certificate due to a change in circumstances. See §1.5000C-6, Example 6.

13. Effective Date of Section 5000C and the Final Regulations

Comments recommended that the final regulations delay the applicability of the tax imposed by section 5000C to contracts entered into on or after the date of the publication of the final regulations. Alternatively, one commenter recommended that the final regulations delay the applicability of the tax until the issuance of final amendments to the FAR as promulgated by the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), if any, that may take into account these final regulations. This commenter reasoned that a delay in the application of the final regulations would allow the necessary time needed to amend the FAR in order to take into account the rules provided in the final regulations. While the DoD, GSA, and NASA have amended some sections of the FAR to reflect the enactment of section 5000C (see 48 CFR 31.205-41(b), 52.229-3(b)(2),

52.229-4(b)(2), 52.229-6(c)(2), and 52.229-7(b)(2)), commenters stated that other sections of the FAR (such as CFR 52.229-3) will also need to be amended.

Section 301(a)(3) of the Act specifically provides that the tax imposed by section 5000C applies to payments received pursuant to contracts entered into on and after January 2, 2011, indicating a clear Congressional intent as to the effective date. Further, the Act does not require Treasury regulations or FAR amendments to be applicable before the requirements of the statute take effect. Thus, the final regulations do not adopt this comment and confirm the statutory effective date.

Consistent with the proposed regulations, the final regulations apply on and after the date that is 90 days after the date they are published as final regulations in the Federal Register (applicability date). However, contracting parties and acquiring agencies may rely upon the rules in the final regulations before the applicability date.

Under the Act, while acquiring agencies have an obligation to withhold, the foreign contracting parties remain liable for the tax if withholding does not fully satisfy the foreign person's tax liability. The Treasury Department and the IRS are aware that some foreign persons subject to statutory obligations under section 5000C may have deferred compliance actions pending the applicability of the final regulations. The Treasury Department and the IRS have concluded that 90 days is sufficient for these foreign persons to satisfy their tax and filing obligations with respect to section 5000C for prior periods. Accordingly, §1.5000C-7 provides that if a foreign contracting party fully satisfies its tax and filing obligations under section 5000C with respect to any

payments received in tax years ending before the applicability date of the regulations on or before the later of the applicability date of the final regulations or the due date for the foreign person's income tax return for the year in which the payment was received in a manner consistent with the final regulations, penalties will not be asserted on the foreign contracting parties with respect to those payments or returns. For example, assume a foreign corporation received a single specified Federal procurement payment during its tax year ending on December 31, 2013 that is not described in any of the exemptions in these final regulations, and the payment was not withheld upon. If the corporation files Form 1120-F, "U.S. Income Tax Return of a Foreign Corporation," for 2013 and pays the tax imposed under section 5000C in the manner described in §1.5000C-4(d) before the applicability date of the final regulations, penalties will not be asserted with respect to that payment or return. However, the final regulations do not relieve a foreign person of any applicable rules relating to interest under Subtitle F.

Additionally, for purposes of section 6114 and the regulations thereunder, if a foreign contracting party has received a payment exempt from tax under a qualified income tax treaty before the effective date of the final regulations under section 5000C, reporting is waived if the foreign contracting party has properly relied on Notice 2015-35. See §301.6114-1(e)(2).

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. It

has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The collection of information requirement in the regulations will not have a significant economic impact on a substantial number of small entities because a limited number of foreign contracting parties that are small entities will be subject to the tax, in part because the final regulations provide exemptions for simplified acquisitions and for certain personal service contracts. Because section 5000C(a) applies to foreign persons regardless of the size of the entity, a limited number of small foreign entities that received specified Federal procurement payments are affected by the regulation. Pursuant to section 7805(f) of the Internal Revenue Code, the NPRM preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Kate Hwa and Rosy Lor, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes,
Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 301, and 602 are amended as follows:

PART I--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U. S. C. 7805 * * *

Section 1.5000C-1 is also issued under 26 U.S.C. 5000C
Section 1.5000C-2 is also issued under 26 U.S.C. 5000C
Section 1.5000C-3 is also issued under 26 U.S.C. 5000C
Section 1.5000C-4 is also issued under 26 U.S.C. 5000C
Section 1.5000C-5 is also issued under 26 U.S.C. 5000C
Section 1.5000C-6 is also issued under 26 U.S.C. 5000C

Par. 2. An undesignated center heading is added following §1.5000A-5 to read as follows:

Tax on Certain Foreign Procurement

Par. 3. Section 1.5000C-0 is added after the undesignated center heading to read as follows:

§1.5000C-0 Outline of regulation provisions for section 5000C.

This section lists the captions contained in §§1.5000C-1 through 1.5000C-7.

§1.5000C-1 Tax on specified Federal procurement payments.

- (a) Overview.
- (b) Imposition of tax.
- (c) Definitions.
- (d) Exemptions.
 - (1) Simplified acquisitions.
 - (2) Emergency acquisitions.
 - (3) Certain personal service contracts.
 - (4) Certain foreign humanitarian assistance contracts.
 - (5) Certain international agreements.
 - (6) Goods manufactured or produced or services provided in the United States.
 - (7) Goods manufactured or produced or services provided in a country that is a party to an international procurement agreement.
- (e) Country in which goods are manufactured or produced or services provided.
 - (1) Goods manufactured or produced.
 - (2) Provision of services.
 - (3) Allocation of total contract price to determine the nonexempt amount.
 - (4) Reduction or elimination of withholding by an acquiring agency.

§1.5000C-2 Withholding on specified Federal procurement payments.

- (a) In general.
- (b) Steps in determining the obligation to withhold under section 5000C.
 - (1) Determine whether the payment is pursuant to a contract for goods or services.
 - (2) Determine whether the payment is made pursuant to a contract with a U.S. person.
 - (3) Determine whether the payment is for purchases under the simplified acquisition procedures.
 - (4) Determine whether the payment is for emergency acquisitions.
 - (5) Determine whether the payment is for personal services under the simplified acquisition threshold.
 - (6) Determine whether the payment is pursuant to a foreign humanitarian assistance contract.
 - (7) Determine whether the foreign contracting party is entitled to relief pursuant to an international agreement.
 - (8) Determine whether the contract is for goods manufactured or produced or services provided in the United States or in a foreign country that is a party to an international procurement agreement.
 - (9) Compute amounts to withhold.
 - (10) Deposit and report amounts withheld.

- (c) Determining whether the contracting party is a U.S. person.
 - (1) In general.
 - (2) Determination based on Taxpayer Identification Number (TIN).
 - (3) Determination based on the Form W-9.
 - (4) Contracting party treated as a foreign contracting party.
- (d) Withholding when a foreign contracting party submits a Section 5000C Certificate.
 - (1) In general.
 - (2) Exemption for a foreign contracting party entitled to the benefit of relief pursuant to certain international agreements.
 - (3) Exemption when goods are manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement.
 - (4) Information required for Section 5000C Certificate.
 - (5) Validity period of Section 5000C Certificate.
 - (6) Change in circumstances.
 - (7) Form W-14.
 - (8) Time for submitting Section 5000C Certificate.
- (e) Offset for underwithholding or overwithholding.
 - (1) In general.
 - (2) Underwithholding.
 - (3) Overwithholding.

§1.5000C-3 Payment and returns of tax withheld by the acquiring agency.

- (a) In general.
- (b) Deposit rules.
 - (1) Acquiring agency with a chapter 3 deposit requirement treats amounts withheld as under chapter 3.
 - (2) Acquiring agency with no chapter 3 filing obligation deposits withheld amounts monthly.
- (c) Return requirements.
 - (1) In general.
 - (2) Classified or confidential contracts.
- (d) Special arrangement for certain contracts.

§1.5000C-4 Requirement for the foreign contracting party to file a return and pay tax, and procedures for the contracting party to seek a refund.

- (a) In general.
- (b) Tax obligation of foreign contracting party independent of withholding.
- (c) Return of tax by the foreign contracting party.

- (d) Time and manner of paying tax.
- (e) Refund requests when amount withheld exceeds tax liability.

§1.5000C-5 Anti-abuse rule.

§1.5000C-6 Examples.

§1.5000C-7 Effective/applicability date.

Par. 4. Sections 1.5000C-1 through 1.5000C-7 are added to read as follows:

§1.5000C-1 Tax on specified Federal procurement payments.

(a) Overview. This section provides definitions and general rules relating to the imposition of, and exemption from, the tax on specified Federal procurement payments under section 5000C. Section 1.5000C-2 provides rules concerning withholding under section 5000C(d)(1), including the steps that must be taken to determine the obligation to withhold and whether an exemption from withholding applies. Section 1.5000C-3 provides the time and manner for depositing the amounts withheld under section 5000C and the related reporting requirements. Section 1.5000C-4 contains the rules that apply to a foreign contracting party that must pay and report the tax under section 5000C when the tax obligation under section 5000C is not fully satisfied by withholding, as well as procedures by which a contracting party may seek a refund when the amount withheld exceeds its tax liability under section 5000C. Section 1.5000C-5 contains an anti-abuse rule. Section 1.5000C-6 contains examples illustrating the principles of §§1.5000C-1 through 1.5000C-4. Finally, §1.5000C-7 contains the effective/applicability date for §§1.5000C-1 through 1.5000C-7.

(b) Imposition of tax. Except as otherwise provided, section 5000C imposes on any foreign contracting party a tax equal to 2 percent of the amount of a specified Federal procurement payment. In general, the tax imposed under section 5000C applies to specified Federal procurement payments received pursuant to contracts entered into on and after January 2, 2011. Specified Federal procurement payments received by a nominee or agent on behalf of a contracting party are considered to be received by that contracting party. The tax imposed under section 5000C is to be applied in a manner consistent with U.S. obligations under international agreements. Payments for the purchase or lease of land or an interest in land are not subject to the tax imposed under section 5000C.

(c) Definitions. Solely for purposes of section 5000C and §§1.5000C-1 through 1.5000C-7, the following definitions apply:

(1) The term acquiring agency means the U.S. government department, agency, independent establishment, or corporation described in paragraph (c)(7) of this section that is a party to the contract. To the extent that a U.S. government department or agency, other than the acquiring agency, is making the payments pursuant to the contract, that department or agency is also considered to be the acquiring agency.

(2) The term contract has the same meaning as provided in 48 CFR 2.101, and thus does not include a grant agreement or a cooperative agreement within the meaning of 31 U.S.C. 6304 and 6305, respectively. A contract may include an agreement that is not executed under the Federal Acquisition Regulations (FAR), 48

CFR Chapter 1.

(3) The term contract ratio refers to the nonexempt amount over the total contract price.

(4) The term contracting party means any person that is a party to a contract with the U.S. government that is entered into on or after January 2, 2011. See §1.5000C-1(b) for situations involving a nominee or agent.

(5) The term foreign contracting party means a contracting party that is a foreign person.

(6) The term foreign person means any person other than a United States person (as defined in section 7701(a)(30)).

(7) The term Government of the United States or U.S. government means the executive departments specified in 5 U.S.C. 101, the military departments specified in 5 U.S.C. 102, the independent establishments specified in 5 U.S.C. 104(1), and wholly owned government corporations specified in 31 U.S.C. 9101(3). Unless otherwise specified in 5 U.S.C. 101, 102, or 104(1), or 31 U.S.C. 9101(3), the term Government of the United States or U.S. government does not include any quasi-governmental entities or instrumentalities of the U.S. government.

(8) The term international procurement agreement means the World Trade Organization Government Procurement Agreement within the meaning of 48 CFR 25.400(a)(1) and any free trade agreement to which the United States is a party that includes government procurement obligations that provide appropriate competitive

government procurement opportunities to U.S. goods, services, and suppliers. A party to an international procurement agreement is a signatory to the agreement and does not include a country that is merely an observer with respect to the agreement.

(9) The term nonexempt amount means the portion of the contract price allocated to nonexempt goods and nonexempt services.

(10) The term nonexempt goods means goods manufactured or produced in a foreign country that is not a party to an international procurement agreement with the United States.

(11) The term nonexempt services means services provided in a foreign country that is not a party to an international procurement agreement with the United States.

(12) The term outlying areas has the same meaning as set forth in 48 CFR 2.101(b), which includes Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(13) The term qualified income tax treaty means a U.S. income tax treaty in force that contains a nondiscrimination provision that applies to the tax imposed under section 5000C and prohibits taxation that is more burdensome on a foreign national than a U.S. national (or in the case of certain income tax treaties, taxation that is more burdensome on a foreign citizen than a U.S. citizen), regardless of its residence.

(14) The term Section 5000C Certificate means a written statement that includes the information described in §1.5000C-2(d) that the foreign contracting party submits to

an acquiring agency for the purposes of demonstrating that the foreign contracting party is eligible for certain exemptions from withholding (in whole or in part) under section 5000C with respect to a contract. The term may also include any form that the Internal Revenue Service may prescribe as a substitute for the Section 5000C Certificate, such as Form W-14, "Certificate of Foreign Contracting Party Receiving Federal Procurement Payments."

(15) The term specified Federal procurement payment means any payment made pursuant to a contract with a foreign contracting party that is for goods manufactured or produced or services provided in a foreign country that is not a party to an international procurement agreement with the United States. For purposes of the prior sentence, a foreign country does not include an outlying area.

(16) The term Taxpayer Identification Number or TIN means the identifying number assigned to a person under section 6109, as defined in section 7701(a)(41).

(17) The term total contract price means the total cost to the U.S. Government of the goods and services procured under a contract and paid to the contracting party.

(d) Exemptions. The tax imposed under paragraph (b) of this section does not apply to the payments made in the following situations. For the exemptions in paragraphs (d)(5), (6) and (7) of this section, see §1.5000C-2(d) for the procedures to eliminate withholding by an acquiring agency.

(1) Simplified acquisitions. Payments for purchases under the simplified acquisition procedures that do not exceed the simplified acquisition threshold as

described in 48 CFR 2.101.

(2) Emergency acquisitions. Payments made pursuant to a contract if the contract is--

(i) Awarded under the “unusual and compelling urgency” authority of 48 CFR 6.302-2, or

(ii) Entered into under the emergency acquisition flexibilities as defined in 48 CFR part 18.

(3) Certain personal service contracts. Payments for services provided by, and under contracts with, a single individual in which the payments do not (and will not) exceed on an annual calendar year basis the simplified acquisition threshold as described in 48 CFR 2.101 for all years of the contract. Payments that satisfy this exemption remain exempt if the contract is later renegotiated so that future payments under the contract do not meet this exemption.

(4) Certain foreign humanitarian assistance contracts. Payments made by the U.S. government pursuant to a contract with a foreign contracting party to obtain goods or services described in or authorized under 7 U.S.C. 1691, et seq., 22 U.S.C. 2151, et seq., 22 U.S.C. 2601 et seq., 22 U.S.C. 5801 et seq., 22 U.S.C. 5401 et seq., 10 U.S.C. 402, 10 U.S.C. 404, 10 U.S.C. 407, 10 U.S.C. 2557, and 10 U.S.C. 2561, if the acquiring agency determines that the payment is for the purpose of providing foreign humanitarian assistance.

(5) Certain international agreements. Payments made by the U.S. government

pursuant to a contract with a foreign contracting party when the payments are entitled to relief from the tax imposed under section 5000C pursuant to an international agreement with the United States, including relief pursuant to a nondiscrimination provision of a qualified income tax treaty, because the foreign contracting party is entitled to the benefit of that provision.

(6) Goods manufactured or produced or services provided in the United States.

A payment made pursuant to a contract to the extent that the payment is for goods manufactured or produced or services provided in the United States.

(7) Goods manufactured or produced or services provided in a country that is a party to an international procurement agreement. A payment made pursuant to a contract to the extent the payment is for goods manufactured or produced or services provided in a country that is a party to an international procurement agreement, as defined in paragraph (c)(8) of this section.

(e) Country in which goods are manufactured or produced or services provided--

(1) Goods manufactured or produced. Solely for purposes of section 5000C, goods are manufactured or produced in the country (or countries)--

(i) Where property has been substantially transformed into the goods that are procured pursuant to a contract; or

(ii) Where there has been assembly or conversion of component parts (involving activities that are substantial in nature and generally considered to constitute the manufacture or production of property) into the final product that constitutes the goods

procured pursuant to a contract.

(2) Provision of services. Solely for purposes of section 5000C, services are considered to be provided in the country where the individuals performing the services are physically located when they perform their duties pursuant to the contract.

(3) Allocation of total contract price to determine the nonexempt amount. If, pursuant to a contract, goods are manufactured or produced, or services are provided, in multiple countries and only a portion of the goods manufactured or produced, or the services provided, pursuant to the contract are nonexempt goods or nonexempt services, a foreign contracting party may use a reasonable allocation method to determine the nonexempt amount. A reasonable allocation method would include taking into account the proportionate costs (including the cost of labor and raw materials) incurred to manufacture or produce the goods in each country, or taking into account the proportionate costs incurred to provide the services in each country.

(4) Reduction or elimination of withholding by an acquiring agency. For procedures to reduce or eliminate withholding by an acquiring agency based on where goods are manufactured or produced or where services are provided, including as a result of an allocation under this paragraph (e), see §1.5000C-2(d).

§1.5000C-2 Withholding on specified Federal procurement payments.

(a) In general. Except as otherwise provided in this section, every acquiring agency making a specified Federal procurement payment on which tax is imposed under section 5000C and §§1.5000C-1 through 1.5000C-7 must deduct and withhold an

amount equal to 2 percent of the payment. For rules relating to the liability of a foreign contracting party with respect to specified Federal procurement payments not fully withheld upon at source, see §1.5000C-4. An acquiring agency may rely upon any information furnished by a contracting party under this section unless the acquiring agency has reason to know that the information is incorrect or unreliable. An acquiring agency has reason to know that the information is incorrect or unreliable if it has knowledge of relevant facts or statements contained in the submitted information such that a reasonably prudent person in the position of the acquiring agency would know that the information provided is incorrect or unreliable.

(b) Steps in determining the obligation to withhold under section 5000C. An acquiring agency generally determines its obligation to withhold under section 5000C according to the steps described in this paragraph (b). See, however, paragraph (e) of this section for situations in which withholding may be increased in the case of underwithholding, or may be decreased in the case of overwithholding.

(1) Determine whether the payment is pursuant to a contract for goods or services. The acquiring agency determines whether it is making a payment pursuant to a contract for goods or services. To the extent that the acquiring agency is making a payment for any other purpose, it does not have an obligation to withhold under section 5000C on the payment.

(2) Determine whether the payment is made pursuant to a contract with a U.S. person. The acquiring agency determines whether the payment is made pursuant to a

contract with a person considered to be a United States person (U.S. person) in accordance with paragraph (c) of this section. If the other contracting party is a U.S. person, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(3) Determine whether the payment is for purchases under the simplified acquisition procedures. The acquiring agency determines whether the payment is for purchases under the simplified acquisitions procedures that do not exceed the simplified acquisition threshold as described in 48 CFR 2.101. If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(4) Determine whether the payment is for emergency acquisitions. The acquiring agency determines whether the payment is made for certain emergency acquisitions within the meaning of §1.5000C-1(d)(2). If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(5) Determine whether the payment is for personal services under the simplified acquisition threshold. The acquiring agency determines whether payments for services under contracts with a single individual do not exceed the simplified acquisition threshold as described in 48 CFR 2.101 on an annual basis for all years of the contract. If that is the case, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(6) Determine whether the payment is pursuant to a foreign humanitarian assistance contract. The acquiring agency determines whether the payment is made

pursuant to a foreign humanitarian assistance contract described in §1.5000C-1(d)(4).

If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(7) Determine whether the foreign contracting party is entitled to relief pursuant to an international agreement. If the foreign contracting party submits a Section 5000C Certificate in accordance with paragraph (d) of this section representing that the foreign contracting party is entitled to relief from the tax imposed under section 5000C pursuant to an international agreement with the United States (such as relief pursuant to the nondiscrimination provision of a qualified income tax treaty), the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(8) Determine whether the contract is for goods manufactured or produced or services provided in the United States or in a foreign country that is a party to an international procurement agreement. If the foreign contracting party submits a Section 5000C Certificate in accordance with paragraph (d) of this section that represents that the contract is for goods manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement, the acquiring agency does not have an obligation to withhold. If the Section 5000C Certificate provides that payments under the contract are only partially exempt from withholding under section 5000C, the acquiring agency must withhold to the extent described in paragraph (b)(8) of this section.

(9) Compute amounts to withhold. If, after evaluating each step described in this

paragraph (b), the acquiring agency determines that it has an obligation to withhold, the acquiring agency computes the amount of withholding by multiplying the amount of the payment by 2 percent, unless the foreign contracting party has provided a Section 5000C Certificate or the payment is only in part for goods or services. In cases in which the Section 5000C Certificate demonstrates that the exemption in Step 8 applies, the acquiring agency generally computes the amount of withholding by multiplying the amount of the payment by the contract ratio provided on the most recent Section 5000C Certificate, the product of which is multiplied by 2 percent. However, in cases in which the exemption in Step 8 applies and the requirements of paragraph (d)(4)(iii)(B)(2) of this section are met, the acquiring agency computes the amount of withholding based on the payment for the specifically identified items, which may be identified by the contract line item number, or CLIN. In the case in which the payment is only in part for goods or services, the acquiring agency reduces the amount of the payment subject to the tax to the extent it is for something other than goods or services. The acquiring agency withholds the computed amount from the payment.

(10) Deposit and report amounts withheld. The acquiring agency deposits and reports the amounts determined in the prior step in accordance with §1.5000C-3.

(c) Determining whether the contracting party is a U.S. person--(1) In general. An acquiring agency must rely on the provisions of this paragraph (c) to determine the status of the contracting party as a U.S. person for purposes of withholding under section 5000C.

(2) Determination based on Taxpayer Identification Number (TIN). An acquiring agency must treat a contracting party as a U.S. person if the U.S. government information system (such as the System for Award Management (SAM)) indicates that the contracting party is a corporation (for example, because the name listed in SAM contains the term “Corporation,” “Inc.,” or “Corp.”) and that it has a TIN that begins with two digits other than “98” (a limited liability company or LLC is not treated as a corporation for purposes of this paragraph (c)(2)). Further, an acquiring agency must treat a contracting party as a U.S. person if the acquiring agency has access to a U.S. government information system that indicates that the contracting party is an individual with a TIN that begins with a digit other than “9”.

(3) Determination based on the Form W-9. An acquiring agency must treat a contracting party as a U.S. person if the person has submitted to it a valid Form W-9, “Request for Taxpayer Identification Number (TIN) and Certificate” (or valid substitute form described in §31.3406(h)-3(c)(2) of this chapter), signed under penalties of perjury.

(4) Contracting party treated as a foreign contracting party. If an acquiring agency cannot determine that a contracting party is a U.S. person based on application of paragraph (c)(2) or (3) of this section, then the contracting party is treated as a foreign contracting party for purposes of this section.

(d) Withholding when a foreign contracting party submits a Section 5000C Certificate--(1) In general. Unless the acquiring agency has reason to know that the information is incorrect or unreliable, the acquiring agency may rely on a claim that a

foreign contracting party is entitled to an exemption (in whole or in part) from withholding on payments pursuant to a contract if the foreign contracting party provides a Section 5000C Certificate to the acquiring agency as prescribed in this paragraph (d). When a Section 5000C Certificate is furnished, the acquiring agency does not withhold, or must reduce the amount of withholding, on payments made to a foreign person if the certificate establishes that the foreign person is wholly or partially exempt from withholding. An acquiring agency may establish a system for a foreign contracting party to electronically furnish a Section 5000C Certificate.

(2) Exemption for a foreign contracting party entitled to the benefit of relief pursuant to certain international agreements. An acquiring agency does not withhold on payments pursuant to a contract with a foreign contracting party when the payment is entitled to relief from the tax imposed under section 5000C pursuant to an international agreement, including relief pursuant to a nondiscrimination provision of a qualified income tax treaty, because the foreign contracting party is entitled to the benefit of that agreement and the foreign contracting party has submitted a Section 5000C Certificate that includes all of the information described in paragraphs (d)(4)(i) and (ii) of this section.

(3) Exemption when goods are manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement. An acquiring agency does not withhold on payments pursuant to a contract with a foreign contracting party to the extent that the payments are for goods

manufactured or produced or services provided in the United States or in a foreign country that is a party to an international procurement agreement with the United States, provided that the foreign contracting party has submitted a Section 5000C Certificate that includes all of the information described in paragraphs (d)(4)(i) and (iii) of this section. If the Section 5000C Certificate provides that the payment is only partially exempt from withholding under section 5000C, the acquiring agency must withhold to the extent that the payment is not exempt.

(4) Information required for Section 5000C Certificate--(i) In general. The Section 5000C Certificate must be signed under penalties of perjury by the foreign contracting party and contain--

(A) The name of the foreign contracting party, country of organization (if applicable), and permanent residence address of the foreign contracting party;

(B) The mailing address of the foreign contracting party (if different than the permanent residence address);

(C) The TIN assigned to the foreign contracting party (if any);

(D) The identifying or reference number on the contract (if known);

(E) The name and address of the acquiring agency;

(F) A statement that the person signing the Section 5000C Certificate is the foreign contracting party listed in paragraph (d)(4)(i)(A) of this section (or is authorized to sign on behalf of the foreign contracting party);

(G) A statement that the foreign contracting party is not acting as an agent or

nominee for another foreign person with respect to the goods manufactured or produced or services provided under the contract;

(H) A statement that the foreign contracting party agrees to pay an amount equal to any tax (including any applicable penalties and interest) due under section 5000C that the acquiring agency does not withhold under section 5000C;

(I) A statement that the foreign contracting party acknowledges and understands the rules in §1.5000C-4 relating to procedural obligations related to section 5000C; and

(J) A statement that the foreign contracting party has not engaged in a transaction (or series of transactions) with a principal purpose of avoiding the tax imposed under section 5000C as defined in §1.5000C-5.

(ii) Additional information required for claiming an exemption based on certain international agreements with the United States. In addition to the information required by paragraph (d)(4)(i) of this section, a foreign contracting party claiming an exemption from withholding in reliance on a provision of an international agreement with the United States, including a qualified income tax treaty, must provide--

(A) The name of the international agreement under which the foreign contracting party is claiming benefits;

(B) The specific provision of the international agreement relied upon (for example, the nondiscrimination article of a qualified income tax treaty); and

(C) The basis on which it is entitled to the benefits of that provision (for example, because the foreign contracting party is a corporation organized in a foreign country that

has in force a qualified income tax treaty with the United States that covers all nationals, regardless of their residence).

(iii) Additional required information for claiming exemption based on country where goods are manufactured or services provided. (A) In general. In addition to the information required by paragraph (d)(4)(i) of this section, a foreign contracting party claiming an exemption from withholding (in whole or in part) because payments will be pursuant to a contract for goods manufactured or produced or services provided in the United States, or a foreign country that is party to an international procurement agreement, must describe on the Section 5000C Certificate the relevant goods or services and the country (or countries) in which they are manufactured or produced, or are provided, and must include the name of the international procurement agreement or agreements (if relevant).

(B) Information on allocation to exempt and nonexempt amounts. (1) In general. In situations in which a foreign contracting party claims the exemption in paragraph (d)(3) of this section with respect to only a portion of the payments received under the contract, the Section 5000C Certificate must include an explanation of the method used by the foreign contracting party to allocate the total contract price among the countries, as described in §1.5000C-1(e)(3), if applicable. In general, the Section 5000C Certificate also must include the total contract price and the nonexempt amount; however, when necessary, an estimate of the total contract price or the nonexempt amount may be used. For example, total contract price may be estimated when a

Section 5000C Certificate is being completed with respect to payments to be made pursuant to a cost-reimbursement contract that is paid on the basis of actual incurred costs and the total amount of such costs is not known at the time the certificate is provided.

(2) Specific identification of exempt items. If agreed to by the acquiring agency, the Section 5000C Certificate may identify specific exempt and nonexempt amounts. For example, specific contract line items (such as a contract line item number or CLIN) identified in the contract may be listed on the Section 5000C Certificate as exempt and nonexempt amounts (in whole or in part), as applicable. When this paragraph applies, and whether or not the contract identifies exempt and nonexempt amounts, a foreign contracting party must provide the information required by paragraphs (d)(4)(iii)(A) and (d)(4)(iii)(B)(1) of this section, on the Section 5000C Certificate to explain why the contract line items are eligible for an exemption; however, the foreign contracting party is not required to include information about the total contract price under this paragraph. In these circumstances, only one Section 5000C Certificate is required to be provided identifying the exempt and nonexempt contract line items that relate to the contract (for example, a spreadsheet may be attached to the Section 5000C Certificate that identifies the contract line items with an explanation for the treatment as exempt or nonexempt).

(5) Validity period of Section 5000C Certificate. Except as otherwise provided in paragraph (d)(6) of this section, the Section 5000C Certificate is valid for the term of the contract.

(6) Change in circumstances. A foreign contracting party must submit a revised Section 5000C Certificate within 30 days of a change in circumstances that causes the information in a Section 5000C Certificate held by the acquiring agency to be incorrect with respect to the acquiring agency's determination of whether to withhold or the amount of withholding under Section 5000C. An acquiring agency must request a new Section 5000C Certificate from a contracting party in circumstances in which it knows (or has reason to know) that a previously submitted Section 5000C Certificate becomes incorrect or unreliable. An acquiring agency may request an updated Section 5000C Certificate at any time, including when other documentation is required under the contract, such as the annual representations and certifications required in 48 CFR 4.1201. See §1.5000C-6, Example 6, for an illustration of this paragraph (6).

(7) Form W-14. A foreign contracting party may choose to use Form W-14, "Certificate of Foreign Contracting Party Receiving Federal Procurement Payments" (or other form that the IRS may prescribe), as its Section 5000C Certificate, provided that it includes all the necessary information required by this paragraph (d).

(8) Time for submitting Section 5000C Certificate. A contracting party must submit the Section 5000C Certificate (such as Form W-14 or Form W-9) as early as practicable (for example, when the offer for the contract is submitted to the U.S. government). In all cases, however, the Section 5000C Certificate must be submitted to the acquiring agency no later than the date of execution of the contract.

(e) Offset for underwithholding or overwithholding--(1) In general. If the foreign

contracting party discovers that amounts withheld on prior payments either were insufficient or in excess of the amount required to satisfy its tax liability under section 5000C, the foreign contracting party may request the acquiring agency to increase or decrease the amount of withholding on future payments for which withholding is required under section 5000C. The request must be in writing, signed under penalties of perjury, contain the amount by which the foreign contracting party requests to increase or decrease future amounts withheld under section 5000C, and explain the reason for the request. The request may be submitted in conjunction with an original or updated Section 5000C Certificate.

(2) Underwithholding. Upon receipt of a request described in paragraph (e)(1) of this section, acquiring agencies may increase the amount of withholding under this paragraph to correct underwithholding only if the payment for which the increase is applied is otherwise subject to withholding under section 5000C and made before the date that Form 1042, "Annual Withholding Tax Return for U.S. Source Income of Foreign Persons," is required to be filed (not including extensions) with respect to the payment for which the underwithholding occurred. Amounts withheld under this paragraph must be deposited and reported in the time and manner as prescribed by §1.5000C-3. See §1.5000C-4 for procedures for a foreign contracting party that must pay tax due when its tax liability under section 5000C was not fully satisfied by withholding by an acquiring agency.

(3) Overwithholding. Upon receipt of a request described in paragraph (e)(1) of

this section, acquiring agencies may decrease the amount of withholding on subsequent payments made to the foreign contracting party that are otherwise subject to withholding under section 5000C provided that the payment for which the decrease is applied is made on or before the date on which Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,” is required to be filed (not including extensions) with respect to the payment for which the overwithholding occurred. See §1.5000C-4(e) for procedures for foreign contracting parties to file a claim for refund for the overwithheld amount under section 5000C.

§1.5000C-3 Payment and returns of tax withheld by the acquiring agency.

(a) In general. This section provides administrative procedures that acquiring agencies must follow to satisfy their obligations to deposit and report amounts withheld under §1.5000C-2. An acquiring agency with a section 5000C withholding obligation must increase the amount it deducts and withholds under chapter 3 for fixed or determinable annual or periodical income (FDAP income) by the amount it must withhold under §1.5000C-2. Accordingly, this section generally applies the administrative provisions of chapter 3 for FDAP income relating to the deposit, payment, and reporting for amounts withheld under §1.5000C-2, and contains some variation from those provisions to take into account the nature of the tax imposed under section 5000C.

(b) Deposit rules--(1) Acquiring agency with a chapter 3 deposit requirement treats amounts withheld as under chapter 3. If an acquiring agency has a chapter 3

deposit obligation for a period, it must treat any amount withheld under §1.5000C-2 as an additional amount of tax withheld under chapter 3 for purposes of the deposit rules of §1.6302-2. Thus, depending on the combined amount withheld under chapter 3 and §1.5000C-2, an acquiring agency subject to this paragraph (b)(1) must make monthly deposits, quarter-monthly deposits, or annual deposits under the rules in §1.6302-2. To the extent provided in forms, instructions, or publications prescribed by the Internal Revenue Service (IRS), acquiring agencies must deposit all withheld amounts by electronic funds transfer, as that term is defined in §31.6302-1(h)(4)(i) of this chapter.

(2) Acquiring agency with no chapter 3 filing obligation deposits withheld amounts monthly. If an acquiring agency has no chapter 3 deposit obligation to which the deposit rules of §1.6302-2 apply for a calendar month, it must make monthly deposits of the amounts withheld under the rules in this paragraph (b)(2). Thus, an acquiring agency with no chapter 3 deposit obligations and that has withheld any amount under §1.5000C-2 during any calendar month must deposit that amount by the 15th day of the month following the payment. To the extent provided in forms, instructions, or publications prescribed by the Internal Revenue Service (IRS), acquiring agencies must deposit all withheld amounts by electronic funds transfer, as that term is defined in §31.6302-1(h)(4)(i) of this chapter.

(c) Return requirements--(1) In general. Except as provided in paragraph (c)(2) of this section, an acquiring agency that withholds an amount pursuant to section 5000C generally must file Form 1042-S, "Foreign Person's U.S. Source Income Subject to

Withholding,” and Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,” each year, or other such forms as the IRS may prescribe, to report information related to amounts withheld under section 5000C. The acquiring agency must prepare a Form 1042-S for each contracting party reporting the amount withheld under section 5000C for the preceding calendar year. The Form 1042 must show the aggregate amounts withheld under section 5000C that were required to be reported on Forms 1042-S (including those amounts withheld under section 5000C for which a Form 1042-S is not required to be filed pursuant to paragraph (c)(2) of this section). The Form 1042 must also include the information required by the form and accompanying instructions. Further, any forms required under this paragraph (c) are due at the same time, at the same place, and eligible for the same extended due dates and may be amended in the same manner as Form 1042 and Form 1042-S (or such other forms as the IRS may prescribe related to chapter 3). The acquiring agency must furnish a copy of the Form 1042-S (or such other form as the IRS may prescribe for the same purpose) to the contracting party for whom the form is prepared on or before March 15 of the calendar year following the year in which the amount subject to reporting under section 5000C was paid. It must be filed with a transmittal form as provided in the instructions for Form 1042-S and to the transmittal form. Section 5000C Certificates or other statements or information as prescribed by §1.5000C-2 that are provided to the acquiring agency are not required to be attached to the Form 1042 filed with the IRS. However, an acquiring agency that is required to file Form 1042 must retain a copy of

Form 1042, Form 1042-S, the Section 5000C Certificates, or other statements or information prescribed by §1.5000C-2 for at least three years from the original due date of Form 1042 or the date it was filed, whichever is later. An acquiring agency that is not required to file Form 1042 must retain any Section 5000C Certificates or other statements or information as prescribed by §1.5000C-2 for at least three years from the date the Form 1042 would have been due had the acquiring agency had an obligation to file.

(2) Classified or confidential contracts. An acquiring agency is not required to report information otherwise required by this section on Form 1042-S for payments made pursuant to classified or confidential contracts (as described in section 6050M(e)(3)), unless the acquiring agency determines that the information reported on the Form 1042-S does not compromise the safeguarding of classified information or national security.

(d) Special arrangement for certain contracts. In limited circumstances, the IRS may authorize the amount otherwise required to be withheld under section 5000C to be deposited in the time and manner mutually agreed upon by the acquiring agency and the foreign contracting party. In these circumstances, the IRS may in its sole discretion also modify any reporting or return requirements of the acquiring agency or the foreign contracting party.

§1.5000C-4 Requirement for the foreign contracting party to file a return and pay tax, and procedures for the contracting party to seek a refund.

(a) In general. For purposes of subtitle F of the Internal Revenue Code

(“Procedure and Administration”), the tax imposed under section 5000C on foreign persons is treated as a tax imposed under subtitle A. Except as provided elsewhere in the regulations under section 5000C, forms, or accompanying instructions, the tax imposed on foreign contracting parties under section 5000C is administered in a manner similar to gross basis income taxes. This section provides procedures that a foreign contracting party must follow to satisfy its obligations to report and deposit tax due under §1.5000C-1 as well as procedures for contracting parties to seek a refund of amounts overwithheld.

(b) Tax obligation of foreign contracting party independent of withholding. A foreign contracting party subject to tax under section 5000C and §§1.5000C-1 through 1.5000C-7 remains liable for the tax unless its tax obligation was fully satisfied by withholding by an acquiring agency in accordance with §§1.5000C-2 and 1.5000C-3.

(c) Return of tax by the foreign contracting party. If the tax liability under §1.5000C-1 relating to a payment is not fully satisfied by withholding in accordance with §§1.5000C-2 and 1.5000C-3 (including as a result of the use of an estimated nonexempt amount or estimated total contract price in computing the contract ratio), a foreign contracting party subject to tax under §1.5000C-1 during a calendar year must make a return of tax on, for example, Form 1120-F, “U.S. Income Tax Return of a Foreign Corporation,” or such other form as the Internal Revenue Service (IRS) may prescribe to report the amount of tax due under section 5000C (required return). A foreign contracting party with no other U.S. tax filing obligation other than with respect to

its liability for the tax imposed under section 5000C must file its required return on or before the fifteenth day of the sixth month following the close of its taxable year. The required return must include the information required by the form and accompanying instructions. The required return must be filed at the place and time (including any extension of time to file) provided by the form and accompanying instructions. Penalties for failure to file contained in Subtitle F can apply to foreign contracting parties who fail to file the required return. A foreign contracting party must attach copies of all Forms 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding," received from acquiring agencies (if any) to the required return.

(d) Time and manner of paying tax. A foreign contracting party must pay the tax imposed under section 5000C in the manner provided and in the time prescribed in the required return and accompanying instructions. In general, the foreign contracting party must pay the tax at the time that the required return is due, excluding extensions. To the extent provided in forms, instructions, or publications prescribed by the IRS, each foreign contracting party must deposit tax due under section 5000C by electronic funds transfer, as that term is defined in §31.6302-1(h)(4)(i) of this chapter. A foreign contracting party that fails to pay tax in the time and manner prescribed in this section (or under forms, instructions, or publications prescribed by the IRS under this section) may be subject to penalties and interest under Subtitle F.

(e) Refund requests when amount withheld exceeds tax liability. After taking into account any offsets pursuant to §1.5000C-2(e)(3), if the acquiring agency has

overwithheld amounts under section 5000C and has made a deposit of the amounts under §1.5000C-3(b), the contracting party may claim a refund of the amount overwithheld pursuant to the procedures described in chapter 65. The contracting party's claim for refund must meet the requirements of section 6402 and the regulations thereunder, as applicable, and must be filed before the expiration of the period of limitations on refund in section 6511 and the regulations thereunder. In general, the contracting party making a refund claim must file the required return to claim a refund, stating the grounds upon which the claim is based. A Section 5000C Certificate and a copy of the Form 1042-S received from the acquiring agency must be attached to the required return. For purposes of this section, an amount is overwithheld if the amount withheld from the payment pursuant to section 5000C and §§1.5000C-1 through 1.5000C-7 exceeds the contracting party's tax liability under §1.5000C-1, regardless of whether the overwithholding was in error or appeared correct when it occurred. A U.S. person may seek a refund under this paragraph (e) even if it was treated as a foreign person under the rules in §1.5000C-2 (for example, because it neither had a taxpayer identification number on file in the System for Award Management nor submitted Form W-9, "Request for Taxpayer Identification Number (TIN) and Certification," to the acquiring agency).

§1.5000C-5 Anti-abuse rule.

If a foreign person engages in a transaction (or series of transactions) with a principal purpose of avoiding the tax imposed under section 5000C, the transaction (or

series of transactions) may be disregarded or the arrangement may be recharacterized (including disregarding an intermediate entity), in accordance with its substance. If this section applies, the foreign person remains liable for any tax (including any tax obligation unsatisfied as a result of underwithholding) and the Internal Revenue Service retains all other rights and remedies under any applicable law available to collect any tax imposed on the foreign contracting party by section 5000C.

§1.5000C-6 Examples.

The rules of §§1.5000C-1 through 1.5000C-4 are illustrated by the following examples. For purposes of the examples: All contracts are executed with acquiring agencies on or after January 2, 2011, and are for the provision of either goods or services; none of the exemptions described in §1.5000C-1(d) apply, unless otherwise explicitly stated; the acquiring agencies have no other withholding obligations under chapter 3 of the Code and have no other contracts subject to section 5000C; the foreign contracting parties do not have any U.S. source income or a U.S. tax return filing obligation other than a tax return filing obligation that arises based on the facts described in the particular example; and none of the contracts are classified or confidential contracts as described in section 6050M(e)(3).

Example 1. U.S. person not subject to tax; no withholding. (i) Facts. Company A Inc., a domestic corporation and the contracting party, enters into a contract with Agency L, the acquiring agency. Before making its first payment under the contract (for example, on the date of execution of the contract), pursuant to the first step in §1.5000C-2(b), Agency L determines that the contract will be for services. Under the second step, Agency L reviews Company A Inc.'s record in the System for Award Management (SAM) and determines that Company A is a corporation and is considered to be a U.S. person because Agency L's records demonstrate that Company A Inc. is a

business entity treated as a corporation for tax purposes that has a TIN that does not begin with “98.”

(ii) Analysis. Company A Inc. is a U.S. person and thus is not subject to the tax under section 5000C. Moreover, because Company A Inc. is a corporation for tax purposes that has a TIN that does not begin with “98,” Agency L is able to determine that it has no obligation to withhold any amounts under section 5000C on the payment made to Company A Inc. For purposes of section 5000C, Company A Inc. could also establish that it is a U.S. person by providing a Form W-9, “Request for Taxpayer Identification Number (TIN) and Certification,” to Agency L. Company A Inc. does not need to file a Section 5000C Certificate to demonstrate its eligibility for an exemption from withholding.

Example 2. Foreign national entitled to the benefit of a nondiscrimination provision of a treaty; no withholding. (i) Facts. Company B, a foreign contracting party and a national of Country T, provides goods to Agency M, the acquiring agency. Company B determines that it is exempt from tax under section 5000C because it is entitled to the benefit of the nondiscrimination article of a qualified income tax treaty between the United States and Country T. Company B submits a Section 5000C Certificate to Agency M when the contract is executed. Company B uses Form W-14, “Certificate of Foreign Contracting Party Receiving Federal Procurement Payments,” and properly fills the relevant sections stating the name of the treaty, the specific article relied upon, and the basis on which it is entitled to the benefits of that article. Following the steps in §1.5000C-2, Agency M determines that the nondiscrimination provision of the Country T-United States income tax treaty applies to exempt Company B from the tax imposed under section 5000C. Agency M makes one lump sum payment of \$50 million to Company B pursuant to the contract.

(ii) Analysis. Company B has no liability for tax under section 5000C because it is entitled to the benefit of a nondiscrimination article of a qualified income tax treaty. Because Company B submitted a Section 5000C Certificate meeting the requirements in §1.5000C-2 and Agency M does not have reason to know that the submitted information is incorrect or unreliable, Agency M is not required to withhold under section 5000C. Agency M must retain the Section 5000C Certificate for at least three years pursuant to §1.5000C-3(c)(1) from the due date for the Form 1042 (if it were required).

Example 3. Foreign treaty beneficiary does not submit Section 5000C Certificate; withholding required. (i) Facts. The facts are the same as in Example 2, except that Company B does not submit a Section 5000C Certificate to Agency M before Agency M makes the \$50 million payment.

(ii) Analysis. Company B is not subject to tax under section 5000C, but Agency

M must nevertheless withhold on the payment made to Company B because Agency M did not receive a Section 5000C Certificate from Company B in the time and manner required pursuant to §1.5000C-2(d). Agency M must withhold \$1 million (2 percent of \$50 million) on the payment, and deposit that amount under the rules in §1.5000C-3 no later than the 15th day of the month following the month in which the payment was made. Agency M must also complete Forms 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,” and 1042-S, “Foreign Person’s U.S. Source Income Subject to Withholding,” on or before the date specified on those forms and the accompanying instructions. Agency M must furnish copies of Form 1042-S to Company B. Agency M must retain a copy of the Form 1042 and the Form 1042-S for 3 years from the due date for the Form 1042 pursuant to §1.5000C-3(c)(1). As Company B is not liable for the tax, it may later file a claim for refund pursuant to the procedures described in chapter 65.

Example 4. Foreign contracting party partially exempt from tax under section 5000C when goods are manufactured in different countries. (i) Facts. Company C, a foreign contracting party, provides goods to Agency N in 2015. The terms of the contract require that payment be made to Company C by Agency N in two \$5 million installments in 2015. Company C has a TIN that begins with “98” and is not entitled to relief pursuant to an international agreement with the United States, such as relief pursuant to a nondiscrimination provision of a qualified income tax treaty. Some of the goods are manufactured in Country R, which is a party to an international procurement agreement with the United States, with the remainder being manufactured in Country S, a country that is not a party to an international procurement agreement with the United States. Company C uses a reasonable allocation method based on the information available to it at the time in accordance with §1.5000C-1(e)(3) to estimate that \$3 million is the nonexempt amount that is allocated to the goods produced in Country S. Company C submits a valid and complete Section 5000C Certificate to Agency N in the time and manner required by §§1.5000C-1 through 1.5000C-7 that provides that the nonexempt amount is \$3 million. In 2015, Agency N pays Company C in two installments pursuant to the terms of the contract.

(ii) Analysis. Using a reasonable allocation method to determine the estimated nonexempt amount, Company C determines that pursuant to section 5000C and §§1.5000C-1 through 1.5000C-7, tax of \$30,000 (2 percent of the \$5 million payment, or \$100,000 multiplied by a fraction, the numerator of which is the estimated nonexempt amount, \$3 million, and the denominator of which is the estimated total contract price, or \$10 million) is imposed on each payment made to Company C. Because Company C has timely submitted a Section 5000C Certificate explaining the basis for this allocation, Agency N withholds \$30,000 on each payment made to Company C. Agency N must deposit each \$30,000 withholding tax under the rules in §1.5000C-3 no later than the 15th day of the month following the month in which each payment is made. Agency N

must also complete Forms 1042 and 1042-S and furnish copies of Form 1042-S to Company C. Agency N must retain a copy of the Form 1042 and the Form 1042-S for at least three years from the due date for the Form 1042 pursuant to §1.5000C-3(c)(1). Provided that Agency N properly withholds on the nonexempt portion as required under section 5000C and §§1.5000C-1 through 1.5000C-7 and that Company C's estimate of the nonexempt amount is the actual nonexempt amount, Company C does not have an additional tax liability or a U.S. tax return filing obligation as a result of receiving the payments.

Example 5. Foreign contracting party liable for additional tax under Section 5000C not fully withheld upon due to errors on the Section 5000C Certificate. (i) Facts. The facts are the same as in Example 4, except that the Section 5000C Certificate submitted to Agency N by Company C erroneously provides that the estimated nonexempt amount is \$1.5 million instead of \$3 million. As a result, Agency N only withholds \$15,000 (2 percent of the \$5 million payment multiplied by a fraction (the numerator of which is the estimated nonexempt amount stated on the Section 5000C Certificate, \$1.5 million, and the denominator of which is the estimated total contract price, or \$10 million)) on each payment made to Company C. Agency N neither discovered nor had reason to know that the information on the Section 5000C Certificate was incorrect or unreliable. After both payments have been made and after the filing due date for Form 1042 for 2015, Company C determines that the estimated nonexempt amount should have been stated as \$3 million on the Section 5000C Certificate.

(ii) Analysis. The tax imposed under section 5000C on Company C as a result of the receipt of specified Federal procurement payments is \$60,000 and this amount has not been fully satisfied by withholding by Agency N. Accordingly, Company C must remit additional tax of \$30,000 (\$60,000 tax liability less \$30,000 amounts already withheld by Agency N) and file its required return, a Form 1120-F, "U.S. Income Tax Return of a Foreign Corporation," for 2015 to report this tax liability, as required by §1.5000C-4. Company C must explain its corrected allocation method in its Form 1120-F. Company C must also attach a copy of the Form 1042-S it received from Agency N to Form 1120-F.

Example 6. Foreign contracting party submits revised Section 5000C Certificate due to change in circumstances. (i) Facts. The facts are the same as in Example 4, except that, after the first payment, Company C changes its business so that all of the goods manufactured with respect to the second payment are manufactured in Country R. Prior to the second payment, Company C submits a revised Section 5000C Certificate indicating this change in circumstance pursuant to § 1.5000C-2(d)(6).

(ii) Analysis. Agency N withholds \$30,000 on the first payment made to

Company C and does not withhold on the second payment. Company C does not have an additional tax liability or a U.S. tax return filing obligation as a result of receiving the payments.

§1.5000C-7 Effective/applicability date.

Section 5000C applies to specified Federal procurement payments received pursuant to contracts entered into on and after January 2, 2011. Sections 1.5000C-1 through 1.5000C-7 apply on and after **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Contracting parties and acquiring agencies may rely upon the rules in the regulations before such date. If a foreign contracting party fully satisfies its tax and filing obligations under section 5000C with respect to any payments received in tax years ending before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** on or before the later of **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** or the due date for the foreign person's income tax return for the year in which the payment was received in a manner consistent with the final regulations, penalties will not be asserted on the foreign contracting parties with respect to those payments or returns.

PART 301--PROCEDURE AND ADMINISTRATION

Par. 5. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805* * *

Par. 6. Section 301.6114-1 is amended by adding paragraph (c)(1)(ix) and revising paragraph (e) to read as follows:

§301.6114-1 Treaty-based return positions.

* * * * *

(c) * * *

(1) * * *

(ix) Notwithstanding paragraph (b)(1) of this section, that a nondiscrimination provision of a qualified income tax treaty, as defined in Treas. Reg. §1.5000C-1(c)(13), exempts a payment from tax under section 5000C, but only if the foreign person claiming such relief has provided a Section 5000C Certificate (such as Form W-14, “Certificate of Foreign Contracting Party Receiving Federal Procurement Payments”) to the acquiring agency in accordance with section 5000C and the regulations thereunder.

* * * * *

(e) Effective/applicability date--(1) In general. This section is effective for taxable years of the taxpayer for which the due date for filing returns (without extensions) occurs after December 31, 1988. However, if--

(i) A taxpayer has filed a return for such a taxable year, without complying with the reporting requirement of this section, before November 13, 1989, or

(ii) A taxpayer is not otherwise than by paragraph (a) of this section required to file a return for a taxable year before November 13, 1989, such taxpayer must file (apart from any earlier filed return) the statement required by paragraph (d) of this section before June 12, 1990, by mailing the required statement to the Internal Revenue Service, P.O. Box 21086, Philadelphia, PA 19114. Any such statement filed apart from

a return must be dated, signed and sworn to by the taxpayer under the penalties of perjury. In addition, with respect to any return due (without extensions) on or before March 10, 1990, the reporting required by paragraph (a) of this section must be made no later than June 12, 1990. If a taxpayer files or has filed a return on or before November 13, 1989, that provides substantially the same information required by paragraph (d) of this section, no additional submission will be required. Foreign insurers and reinsurers subject to reporting described in paragraph (c)(7)(ii) of this section must so report for calendar years 1988 and 1989 no later than August 15, 1990.

(2) Section 5000C. Paragraph (c)(1)(ix) of this section applies to payments made on and after **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** pursuant to contracts entered into on and after January 2, 2011. However, a taxpayer that receives payments exempt from tax under section 5000C by reason of a qualified income tax treaty before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** is not required to disclose this position on Form 8833, provided it has properly relied on Notice 2015-35, I.R.B. 2016-14, 533, in claiming the exemption.

* * * * *

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 7. The authority citation for part 602 continues to read in part as follows:

Authority: 26 U.S.C. 7805* * *

Par. 8. In §602.101, paragraph (b) is amended by adding entries in numerical

order to the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described					Current OMB control No.
*	*	*	*	*	
1.5000C-2					1545-0096
					1545-2263
1.5000C-3					1545-0096
					1545-2263
1.5000C-4					1545-1223
					1545-0074
*	*	*	*	*	

John M. Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: July 22, 2016.

Mark D. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016-19452 Filed: 8/17/2016 8:45 am; Publication Date: 8/18/2016]